No. 88-949 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD O. POST, JR.,

Petitioner,

—v.—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the courts below correctly grant and affirm summary judgment dismissing plaintiff's libel claims without affording plaintiff access to an admittedly privileged memorandum where (i) plaintiff had acknowledged that he had a full and complete opportunity to conduct discovery of information purportedly contained in the privileged memorandum, (ii) the content of that privileged communication was never relied upon by defendants as justification for the challenged statements or in defense of plaintiff's claims, and (iii) the courts below specifically excluded the privileged communication in considering the summary judgment motion?

2. Did the courts below err when they applied, in this diversity libel action, well-settled New York law, which requires a private plaintiff to demonstrate that, in matters of public concern, a defendant acted with "gross irresponsibility" or "actual malice" in order to recover for libel?

3. Does the determination of the courts below, that plaintiff had failed to raise issues of fact warranting a trial regarding the existence of "gross irresponsibility" under New York law, present an issue for review?

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PRELIMINARY STATEMENT

Respondents, John M. Regan, Jr. and Marsh & McLennan Companies, Inc., respectfully request that this Court deny the Petition for writ of certiorari seeking review of the Order of the United Stated Court of Appeals for the Second Circuit in this case.

STATEMENT OF THE CASE

A. Background Facts

This action arises from the much publicized 1984 loss to Marsh & McLennan Companies, Inc. ("MMC" or the "Company") of approximately $165 million resulting from unauthorized investment activities within the Investment Management Group ("IMG") of the Company. Petitioner Richard O. Post, Jr. ("Post") was head of the IMG. In that capacity, Post managed all fiduciary and corporate cash of MMC and its operating companies and throughout 1983 and 1984 was responsible for ensuring that investments were made in compliance with relevant state laws and the Company's investment resolutions. R. at 4a.[1] Post reported to the Company's Treasurer, Chester A. Gan ("Gan") and supervised Dorothy M. Conway ("Conway"), the chief bond trader, and other members of the IMG. *Id.*

The loss arose from the IMG's covert practice of borrowing either all or the major portion of the purchase price of various bonds. Neither Post nor his subordinates had authorization to borrow money to finance bonds. On April 5, 1984, Richard Wright ("Wright"), Chief Financial Officer of Drexel Burnham Lambert Incorporated ("Drexel"), telephoned Post and advised him that the IMG's financed securities positions at Drexel were much larger than Post had led him to believe during their conversations in February, 1984. R. at 4a-5a. In addition, Wright informed Post that MMC's 1983 public financial statements failed to disclose, as required, the existence of approximately $350 million in financings at Drexel. *Id.* After further discussions with Wright, and no doubt aware that the unauthorized transactions would soon become known to the Company, Post finally told Gan. R. at 5a. John M. Regan, Jr. ("Regan"), then Chairman of the Board of the Company, was advised, and an investigation was immediately undertaken by, among others, the Company's outside counsel, Willkie Farr &

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1 References are to the decisions of the courts below annexed as the appendix to Post's Petition, hereinafter cited as "R at _____."

Gallagher, and its independent auditors, Arthur Andersen & Co., as well as the Company's inside counsel and the accounting staffs of MMC and its subsidiaries. *Id.*

The publicly disclosed investigations over the ensuing two months exposed the magnitude of the unauthorized financing transactions entered by the IMG and concealed from the Company, which ultimately were found to have amounted to $2 billion. As additional information surfaced, MMC issued press releases, made the requisite filings with the Securities and Exchange Commission, and postponed its Annual Meeting of Shareholders so that a complete presentation concerning the losses and the circumstances surrounding them could be made to its shareholders, the investing public and the insurance industry. R. at 5a.

On June 8, 1984, Regan presided over the Company's adjourned Annual Meeting of Shareholders at which he read prepared remarks concerning the Company's losses. R. at 5a-6a. Regan noted that, unknown to senior management, certain individuals in the IMG had engaged in unauthorized trading and financing activities and concealed those activities by entering incorrect investment data into the record-keeping system. *Id.* Regan stated that the persons engaged in the unauthorized investing could have been more closely supervised, and, consequently, the Company's senior management believed it was appropriate to terminate the employment of certain members of the IMG and the Company's Treasurer, and had done so. *Id.* Regan did not identify by name any of those whose employment had been terminated. *Id.*

After delivering his prepared remarks and responding to shareholders' questions, Regan was informally questioned by the media. R. at 6a. During this brief exchange with reporters, and later by phone, Regan confirmed, in response to a specific request that the persons terminated included certain individuals *named by the reporter*, that Post was among them. The subsequent press coverage, with respect to Post, was limited to the mention of his name as one of those whose employment had

been terminated and a statement of the position he had held at MMC. *Id.*

These simple and undisputed facts admit of only one conclusion: Post failed to do his job of supervising the department for which he singularly was responsible and his employment was terminated as a result. Contrary to Post's unfortunate distortion of Regan's remarks, the record below is clear that Regan said no more in his address to the Company's shareholders nor later to the press.

B. Nature of the Action

On December 20, 1984, Post commenced a diversity action seeking damages arising out of the termination of his employment with the Company. R. at 3a. Post's Complaint alleged four separate causes of action. The First Claim for Relief alleged that the termination of his employment and compensation as of June 30, 1984, was "wrongful" and constituted a breach of an implied obligation of good faith and fair dealing. The Second, Third and Fourth Claims for Relief alleged that Regan defamed him by confirming to the media in response to their inquiries, that Post was among those whose employment had been terminated. *Id.* The three libel claims differed only in the standard of liability Post sought to impose and the amount of damages.

C. The Proceedings Below

On June 30, 1985, MMC and Regan answered the Complaint and advanced seven counterclaims against Post grounded in his failure to carry out his responsibility of supervising the trading and investing of his immediate subordinate Conway (First, Second and Third Counterclaims), and his failure to disclose Conway's unauthorized financing transactions to senior management as well as his circulation of reports to the Company's and the Company's subsidiaries' financial officers which misrepresented the nature of Conway's trading, profits earned and the composition of the investment portfolios. (Fourth, Fifth, Sixth and Seventh Counterclaims).

The parties conducted more than two and one-half years of discovery, including depositions of Regan and reporters who published accounts of MMC's $165 million loss. At his deposition, Regan, in contrast to Post's distortions of the record, succinctly stated the reasons for termination of Post's employment—he did not do his job and, as a result, the Company lost $165 million.

On August 28, 1987, after discovery had been closed, the Company and Regan moved for summary judgment dismissing each of the claims in the Complaint on the grounds that after lengthy discovery Post had failed to adduce admissible factual evidence of sufficient quality and quantity on each and every element of his claims; that Post had failed to identify a single material fact in dispute requiring a trial of his claims; and that based upon the uncontested record the Company was entitled to judgment dismissing each of the claims in the Complaint as a matter of law. In stark contrast to Post's disingenuous contention, Regan and the Company never argued at any point in their memorandum in support of their motion or elsewhere that Regan relied on reports of counsel in making the allegedly libelous remarks. Indeed, Regan testified to the contrary, as Post is well aware.

Only after discovery had been closed and on the eve of the return date of the summary judgment motion, and perhaps sensing the inevitable, Post moved before Judge Daronco seeking again to depose Regan on his "state of mind," precisely the same subject that he had acknowledged he had covered at length at Regan's deposition two and one-half years earlier, and to obtain access to a privileged document, a memorandum of counsel, of which he had been aware for more than two years. Post had, a year and one-half earlier, made the same request before Judge Griesa, before whom the case was then pending, and had withdrawn the application after discussing with Judge Griesa the fact that he had fully and sufficiently examined Regan. Judge Griesa, as the record demonstrates, did not "defer to trial" the issue of the privileged memorandum, a falsification concocted by Post. Rather, Post withdrew his request along with his application to redepose Regan. Equally specious

is Post's bald assertion that Judge Daronco denied Post's application in all respects other than for the privileged memorandum. The simple truth is that, as Judge Daronco's order states, Judge Daronco denied Post's application in its entirety, including his request for the privileged memorandum. R. at 1a-2a. Post did not move for reconsideration.

D. The District Court's Decision

On January 20, 1988, Judge Daronco granted Respondents' motion for summary judgment and dismissed the Complaint in its entirety holding that the material facts relevant to the disposition of the motion were not in dispute and that Regan and MMC were entitled to judgment on each of the claims as a matter of law. R. at 3a-13a. In particular, in dismissing the Second and Third Claims for Relief, the District Court held that the reporting of the bond loss and the remedial action attendant thereto, which were widely reported by the media, clearly involved matters of public concern. *Id.* at 11a. The Second and Third Claims, grounded in libel and based upon theories of strict liability and simple negligence, therefore, were dismissed on the grounds that, in matters of public concern, New York law required proof of a higher degree of fault, *i.e.*, "gross irresponsibility." *Id.* at 11a-12a.

As a reading of Judge Daronco's order and opinion unequivocally demonstrates, the District Court did not consider the "gross irresponsibility" standard applicable to Respondents because Regan's remarks were publicized by the media as Post asserts. Rather, Judge Daronco relied upon and cited unchallenged New York law holding that, in matters of public concern, "gross irresponsibility" was the appropriate standard of liability to be applied to non-media defendants. R. at 11a-12a.

In disposing of Post's Fourth Claim for Relief (liability based on gross irresponsibility and reckless disregard for the truth), the District Court concluded that defendants had come forward with uncontroverted *admissible* evidence that the investigation and subsequent reporting of the Company's losses had been conducted in a careful, responsible manner. R. at 12a. In no

other words, Judge Daronco explicitly stated that he had not relied upon the *in camera* inspection of the privileged memorandum, as Post speculates, and had no need to.

If it were this Court's business to review the fact record, as Post suggests, it would quickly conclude that there is ample evidence to support Judge Daronco and not a scintilla of evidence—not even an *argument*—that the investigation was other than careful and responsible. Specifically, Respondents provided extensive factual detail, including deposition testimony, public filings, press releases and other reports, describing the formation of a task force, which included outside counsel of the Company, officers of the Company and its subsidiaries, and inside and outside accountants, set up to conduct a "far-reaching" investigation into the surrounding circumstances of the bond loss and detailing the immediate corrective measures undertaken by the Company to reduce its exposure upon discovery of the unauthorized transactions. In fact, the investigation was fully described and publicly disclosed in the challenged Annual Meeting remarks.

Further, the District Court did not "ignore" evidence purportedly exonerating Post as he claims without basis in fact. The issue presented by the New York "gross irresponsibility" standard was not whether defendants might have been wrong about Post, but whether an erroneous statement (the *sine qua non* of libel) was based on inadequate inquiry. While Judge Daronco would no doubt have been justified in granting summary judgment simply on the absence of a false statement, the actual basis of the decision—which Post essentially obfuscates or ignores because it is so unequivocally sound—was that defendants' statement was not shown to have been made without an investigation having the quality required by New York law. As the District Court succinctly phrased it:

> The Court finds that, based on the *entire* record, neither Regan nor MMC acted in a grossly irresponsible manner, and plaintiff has not, by a preponderance of the evidence, shown that they did. As plaintiff cannot demonstrate gross irresponsibility, it follows he cannot meet the higher stan-

> dard of actual malice. Accordingly, defendants' Motion for summary judgment as to the fourth claim is granted.

R. at 13a (emphasis added).

E. The Second Circuit's Decision

By Order, dated June 27, 1988, the United States Court of Appeals for the Second Circuit affirmed the decision of the District Court granting summary judgment dismissing Post's claims. Addressing the propriety of the standard of liability applied by the District Court, the Second Circuit held that the alleged defamatory speech "undoubtedly addressed a matter of 'public concern' " and, therefore, the District Court correctly ruled that, under New York law, Post would be required to demonstrate that Regan and MMC acted with "gross irresponsibility" in connection with the challenged statements. R. at 20a. The District Court accordingly had correctly dismissed Post's libel counts grounded in strict liability and simple negligence.

As to Post's libel claims based on "gross irresponsibility" and "actual malice," the Second Circuit concluded that the record upon which the District Court had relied amply supported its finding that the investigation of the Company's losses and the reporting of the unauthorized investment activities were conducted in a careful and responsible manner. Further, the court stated, no purported "evidence" or rationale which had been proposed by Post met, as a matter of law, the "gross irresponsibility" standard. Accordingly, the District Court had properly granted summary judgment in defendants' favor. R. at 21a-22a.

As is readily apparent from even a cursory review of the Second Circuit's Order, the Second Circuit did not "overlook" Post's request for actual damages as Post claims. Nor did the Second Circuit hold that "actual malice" was "constitutionally required" for Post to succeed, as Post attempts to suggest by quoting the Second Circuit out of context. The Second Circuit, as did Judge Daronco, simply applied controlling New York law.

The Second Circuit also soundly rejected Post's contention that MMC or Regan had relied upon the content of any privileged material as justification for Regan's remarks or in defense to Post's claims. The Second Circuit further found wholly lacking in merit, Post's assertion that the District Court must have relied upon the privileged memorandum in dismissing the action, ruling that the District Court's conclusions were based upon its consideration of the full record of admissible evidence (which Post blatantly disregards) and not any privileged matter.

In denying Post's Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 6, 1988, the Second Circuit again reinforced the lack of merit to Post's contentions.

SUMMARY OF REASONS WHY POST'S PETITION SHOULD BE DENIED

This is a diversity suit decided by application of New York state law. It was correctly decided, and there is not one hint of doubt as to its correctness from any of the federal judges in the District Court, the Court of Appeals panel or the other Court of Appeals judges who denied rehearing *en banc*.

Apart from the correctness of the decision, it is plainly an inappropriate choice for certiorari, under the familiar principles which this Court has articulated. In discussing the standards governing review by certiorari, the Court has made clear that it will decline to exercise its jurisdiction to review by certiorari in all but the most extraordinary cases. Thus, the Supreme Court has indicated that jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions. Sup. Ct. R. 17; *Forsyth v. Hammond*, 166 U.S. 506 (1897). Measured against the foregoing standard, Post's claims fall far short of demonstrating an appropriate case for review.

Post has failed to demonstrate that he was not afforded a full and complete opportunity to discover information concerning the challenged libelous statements purportedly contained in the

privileged memorandum. In any event, the privileged memorandum was not discoverable. Respondents never relied upon the contents of that document in any briefing or argument as justification for the challenged statements, or in defense of Post's claims, and the courts below correctly dismissed Post's claims based upon the uncontested record of *admissible* evidence and explicitly disclaimed any reliance upon any privileged matter.

The District Court and Second Circuit correctly applied well-settled New York law that limits a private plaintiff's right to recover for alleged libel against a non-media defendant where, as here, the challenged speech clearly involved a matter of public concern, except upon a showing that the defendant "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Post simply failed to meet this standard of fault.

The courts below weighed the full record of admissible evidence and correctly concluded that based upon this uncontested record, Respondents were entitled to judgment dismissing Post's claims as a matter of New York law. There is simply no legitimate reason for this Court to expend its resources to review an entire record of facts peculiar to an individual diversity case to determine whether the District Court and the Second Circuit correctly weighed that record in applying a state court defined rule of law.

POINT I

POST HAS NOT DEMONSTRATED THAT THE WITHHOLDING OF AN ADMITTEDLY PRIVILEGED MEMORANDUM, NOT RELIED UPON BY RESPONDENTS AND SPECIFICALLY EXCLUDED FROM CONSIDERATION BY THE COURTS BELOW, PRESENTS ANY "ISSUE" APPROPRIATE FOR REVIEW.

In his Petition, with a breadth and imprecision of argument more appropriate for a jury summation, Post presents the grip-

ping picture of a plaintiff denied access to a supposedly decisive document which he says had been relied upon by his adversaries and the courts below. How could the courts below have perpetrated such plain unfairness, without at least a whimper of protest from one of the Judges?

Of course the picture is false. Before demonstrating its falsity, Respondents note that questions of application of the attorney-client privilege rarely merit Supreme Court review. *Upjohn Co. v. United States*, 449 U.S. 383 (1981), exemplifies the rare exception. If the Supreme Court wishes again to consider the attorney-client privilege, it should presumably do so because the case reviewed enunciates a novel or questionable legal standard. The Petition does not suggest that this is such a case; indeed, Post contends that the District Court did not rule one way or the other on his belatedly renewed discovery initiative. Furthermore, the very factors in this case which refute the Petition's presentation of egregious unfairness also brand the ruling below as singularly inappropriate for consideration by this Court. In essence, the document issue is an after-thought, inflated by Post to amplify an unmeritorious appeal. Contrary to the Petition, pursuit of the document had been abandoned by Post at the discovery stage of the case; Respondents did not rely on the content of the document as justifying the supposedly libelous statements, and the District Court's *explicit* denial of reliance on the document was affirmed by the Court of Appeals.

As to the supposed reliance on the document by defendants, Post's contention is belied by the record and has been rejected by two District Courts and by the Second Circuit. Regan has testified that he drafted his remarks, and that they were reviewed by senior management of the Company and inside and outside counsel. There is no evidence whatsoever that Regan even saw, let alone read or relied upon, the privileged memorandum at issue. There certainly is nothing in the record to support Post's fanciful assertion that the memorandum was "admittedly shown to [R]espondent Regan shortly before the making of the defamatory remarks." *See* Pet. at 11. Indeed, it

is astonishing that Post has the temerity to make such a clearly erroneous statement.

Equally false is Post's concocted explanation of his abandonment of the pursuit of the document. Judge Griesa, contrary to Post's claim, did not defer ruling on Post's request for access to the memorandum until trial. *See* Pet. at 11. Post had argued before Judge Griesa that he must obtain the memorandum to examine Regan's "state of mind" when he made the purportedly libelous, albeit to this date undefined, remarks on June 8, 1984. After admitting to Judge Griesa that he had fully examined Regan's "state of mind" in a deposition taken the year before, he withdrew his application, and allowed discovery to be closed without pursuing the matter further.

With discovery closed, the time was ripe for defendants' summary judgment motion. Post reacted in a manner typical of parties facing such a motion; he sought additional discovery in the hope of staving off summary judgment. Post urged before Judge Daronco precisely those arguments which he had abandoned before Judge Griesa. Judge Daronco clearly rejected Post's argument and so stated in his order. R. at 1a., 2a. Post's assertion that Judge Daronco "never decided [P]etitioner's motion for its [the memorandum] production," Pet. at 11, is directly contradicted by the record.

A further false facet of Post's gripping picture of unfair discovery denial is the distortion that the document he now seizes upon constituted uniquely important evidence. The inherent logical flaw in that argument was clear to the courts below. Post does not claim that Regan failed to provide sufficient testimony. Nor does he claim, and cannot, that Regan did not testify regarding his reasons for believing that the termination of Post's employment was appropriate. Indeed, Regan made no mystery of his views—the IMG's unauthorized activities had cost the Company $165 million, and Post was in charge of supervising their conduct to ensure that all investments were in accordance with MMC's policies. In short, he failed to do his job.

Since there is no evidence that Regan had ever read the document, let alone that he had it in mind, when he acted and spoke, the "state of mind" argument at best rests upon conjecture. Even if we indulge such a conjecture by Post, and suppose that he further entertains the wholly fanciful notion that Regan may have lied at his deposition, Post fails to identify particular testimony which could be probed by the document. In any event, there is simply no precedent or policy to support the proposition that a party's desire to test the probity of an adverse witness' recollection justifies eviscerating the attorney-client privilege. Such an exception would swallow the rule.

There is, of course, a "shield not sword" waiver doctrine concerning the attorney-client privilege, *see Hunt v. Blackburn*, 128 U.S. 464 (1888), but it cannot be applied on this record. Neither Regan nor MMC, as the record before the courts below confirms, has ever asserted any reliance on a report of counsel as a defense, argument or justification. The element of reliance is solely in the mind of Post's counsel. Accordingly, the courts below properly rejected the same inapplicable cases relied on by Post here.

Perhaps Post's greatest violence to the record is the claim that the courts below based their rulings on that privileged material. The orders of both courts expressly belie such a frivolous contention. In examining whether Regan's and MMC's conduct was "grossly irresponsible," Judge Daronco stated that "defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner." R. at 12a. Since Post had raised the issue of the attorney-client privilege in connection with the privileged memorandum submitted to Judge Daronco *in camera*, it is plain that Judge Daronco used the word "admissible" for the specific purpose of demonstrating that he had not relied on the document, the privileged and hence unadmissible character of which he was simultaneously sustaining. The Second Circuit understood Judge Daronco's carefully phrased statement to mean just that—that he only relied on *admissible* evidence, not the memorandum, and rejected Post's claim of error on appeal as without merit. *See* R. at 22a.

Post says there was no such admissible evidence, and invites this Court to review the fact record. However, both courts below took pains to point out details from the record elaborating on the care and scope of MMC's well-documented and publicly-disclosed investigation. Post's claim is made yet more outrageous by the fact that the Annual Meeting remarks that he challenges contained a full depiction of the investigation and Post himself testified at length regarding the details of the investigation. Simply put, Post was not deprived of any material information nor did the courts below impermissibly rely on evidence not in the record. Post's contentions present no issue for review.

As should be apparent from the foregoing, the purported conflict with the decisions of this Court, the First Circuit and Rule 56(f) of the Federal Rules of Civil Procedure that Post mentions is purely another misguided attempt to create an issue where none exists. *See* Pet. at 10. In any event, the cases he relies on have no bearing on the matters at hand. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) never considered any issue concerning privileged matter; therefore, no conflict could logically exist. In the First Circuit cases, *Association for Reduction of Violence v. Hall*, 734 F.2d 63 (1st Cir. 1984) and *Bane v. Spencer*, 393 F.2d 108 (1st Cir. 1968), *cert. denied*, 400 U.S. 866 (1970), the courts below had expressly relied upon matter previously found to be protected from discovery under various privileges and therefore was held to have been inadmissible. Here, in contrast, both courts below specifically pointed out that only admissible evidence formed the basis of the rulings. Nor does Rule 56(f) of the Federal Rules of Civil Procedure offer Post solace, given that Rule 56(f) itself has no requirements with regard to privileged matters.

Finally, in one last effort to create a reviewable issue, Post claims that, in some unspecified fashion, he has been deprived of an interest in property without procedural due process. Pet. at 12. Apparently, what Post is contending is that by the District Court's granting summary judgment in defendant's favor or by the Second Circuit's affirming the correctness of that ruling, Post was deprived of a trial of the issues; therefore, his

"constitutional rights" were violated. In support of this curious proposition, Post cites no rule or decision of this Court which endows a defamation plaintiff with any unusual right to a jury trial. To the contrary, this Court has held that summary judgment is appropriate in defamation actions where the party opposing a properly supported motion does not carry his evidentiary burden. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The courts below correctly held that Post did not meet this burden. Every summary judgment granted denies a trial, but it is fatuous to contend that the possibility of error necessarily raises a constitutional question for Supreme Court review.

POINT II

THE SECOND CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S RULING GROUNDED SOLELY IN NEW YORK LAW; THUS IN REQUESTING THAT THIS COURT REVIEW THE DECISION OF THE SECOND CIRCUIT, WHICH IS SOLIDLY BASED ON NEW YORK LAW, POST HAS SIMPLY FAILED TO PRESENT ANY REVIEWABLE ISSUE.

Post seeks review by this Court on the ground that the Second Circuit applied the wrong constitutional standard in affirming the District Court's Order granting summary judgment. Apparently, while difficult to follow, the crux of Post's claim is that he, as a private individual, "is not required by the First Amendment to establish anything more than simple fault in order to recover damages for actual injury." Pet. at 13. Post maintains that "[p]roof of actual malice or gross irresponsibility or satisfaction of any other implementation of the actual malice requirement is not required," and, therefore, the Second Circuit erred by applying an "incorrect constitutional standard." Pet. at 14. The Second Circuit, however, based its holding, as did the District Court, on well-settled New York law, not on "incorrect constitutional standard[s]." *Id.*; *see* R. at 20a-21a.

Post tellingly fails to discuss the reasoning of the courts below and their clear and explicit reliance on New York law. Rather, he retreats to obfuscatory remarks about damages and the First Amendment, mischaracterization of the holdings below and misstatement of governing legal principles. What Post carefully avoids is that, under *Gertz v. Robert Welch, Inc.*, New York is fully entitled to burden a libel plaintiff more heavily than the minimal burden imposed by the First Amendment.

The issue before the Second Circuit was whether, under New York law, the District Court had applied the appropriate standard of liability. The District Court had stated, citing New York precedent, that when the purported defamatory speech is a "matter of public concern" no standard less than that of "gross irresponsibility" may govern even in the non-media defamation context. Finding that, based on the evidence in the record, including that of reporters who testified that the Company's $165 million loss and the circumstances surrounding it were "matters of public concern," Regan's remarks were clearly of "public concern," Judge Daronco dismissed Post's libel counts based on strict liability and simple negligence. R. at 12a. The Second Circuit concurred. R. at 20a-21a.

Indeed, in articulating the only governing standard applicable to the circumstances at hand the Second Circuit recited and relied upon principles of New York law:

> *[u]nder New York law* implementing the constitutional restraints reflected in the "actual malice" standard, a plaintiff may recover only if the defendants "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

R. at 20a (quoting *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (emphasis added). Moreover, in holding that the "gross irresponsibility" standard applies to non-media defendants, such as Regan and MMC, the Second Circuit again applied New York law. *Id.* (citing *Pollnow v. Poughkeepsie*

Newspapers, Inc., 107 A.D.2d 10, 486 N.Y.S.2d 11 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 778, 492 N.E.2d 125, 501 N.Y.S.2d 17 (1986) (dismissing libel claim against non-media defendant based upon theory of negligence holding where the challenged speech involved a matter of public concern, standard for liability for defamation in New York is "gross irresponsibility"); *Luisi v. JWT Group, Inc.*, N.Y.L.J., Sept. 18, 1987, at 7, col.3 (N.Y.Sup. Ct.), *aff'd mem.*, 138 A.D.2d 987, 525 N.Y.S.2d 454 (1st Dep't 1988) (granting summary judgment for defendant applying *Chapadeau's* "gross irresponsibility" standard to private plaintiff's libel claim against corporation and its Chairman for statements made in a company press release regarding losses to the company as a result of improper activities of the plaintiff and confirming that the plaintiff's employment had been terminated in connection with the losses)).

In other words, the issue was not what type of damages Post could recover, as he would have this Court believe, but rather whether New York law recognized causes of action for strict liability or simple negligence when the challenged speech was a "matter of public concern." Both courts below correctly held that New York law did not. There was absolutely no constitutional issue before the courts, as a reading of the opinions below clearly demonstrates. Both courts simply followed this Court's teachings in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and applied state law. Therefore, Post's unsupported notion that he as a private individual is not required by the First Amendment to establish anything more than simple fault in which to recover damages for actual injury, (Pet. at 14), is nothing more than a red herring.

Granted, by virtue of Rule 17 of the Rules of the Supreme Court, this Court obviously enjoys great discretion in deciding whether to review a case on writ of certiorari. Equally obvious is the fact that this Court ascertains whether a "special and important" reason for review has been suggested by a petitioner. In the instant case, the Court—and Respondents for that matter—are left only to surmise the reason why Post is urging this Court to expend its precious time and resources to review a state law matter uniformly settled by the lower courts.

While such an exercise of discretion is certainly within this Court's powers, this Court should adhere to its well-settled principle that the Supreme Court traditionally refrains from reviewing questions of state law, particularly in circumstances such as those here.

This court has long stated that ordinarily it will not grant certiorari to review questions of state law. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); *Atkins v. Louisiana*, 441 U.S. 927 (1979) (certiorari denied because it appeared "that the judgment below rests on independent and adequate state grounds"); *see Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *see also* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice And Procedure*, § 4036 (1988). The Court is hesitant to review state law determinations primarily because the lower federal courts are better equipped to entertain and dispose of the issues presented. *See Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985) (citing *Propper v. Clark*, 337 U.S. 472, 486-87 (1949)) ("hesitant to overrule decisions by federal courts skilled in the law of particular states"); *see also Butner v. United States*, 440 U.S. 48, 58 (1979); *accord Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 n.11 (1979); *Bishop v. Wood*, 426 U.S. 341, 345-47 (1976).

Moreover, if the Court is again to address the extent to which the First Amendment imposes upon state defamation law a "proof of fault" requirement, it should do so in a case in which the court below considered and applied an erroneous or at least a novel standard rather than where, as here, the court followed a rule devised by the state courts which is considered to be at least as protective of First Amendment values as the Constitution requires. Simply put, the "gross irresponsibility" standard set by New York courts affords greater First Amendment protection to a libel defendant than required by federal constitutional law and thus passes constitutional muster. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves the defendant was at least

negligent in publishing the falsehood. This Court further stated that its ruling left the states free to set a higher standard. *Id.* at 347.

Under *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) and *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 486 N.Y.S.2d 11 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 778, 492 N.E.2d 125, 501 N.Y.S.2d 17 (1986), New York set that higher standard and therefore New York law requires that, where the speech is a matter of public concern, a private plaintiff must meet a higher burden and establish, by a preponderance of the evidence, that the publisher, whether media or non-media, acted in a grossly irresponsible manner. To the extent that Post is claiming that New York should not have set the standard that it did, given that the standard comports with the First Amendment, for this Court to grant review would be contrary to the *Erie* doctrine which mandates that even this Court defer to the law set by the state.

In sum, Post has failed to present to this Court any legal issue worthy of review. The Second Circuit, as did the District Court, based its decision squarely upon well-settled principles of New York law. Contrary to Post's spurious contentions, no "incorrect" constitutional principles were applied. Accordingly, Respondents respectfully request that this Court deny Post's Petition.

POINT III

BY URGING THIS COURT TO REVIEW THE FINDINGS OF THE DISTRICT COURT AND THE SECOND CIRCUIT, POST IS REQUESTING THAT THIS COURT ENGAGE IN A REVIEW OF AN ENTIRE RECORD OF FACTS—A TASK ALREADY PERFORMED THOROUGHLY BY TWO LOWER COURTS. SUCH A FRIVOLOUS REQUEST DISPLAYS A DISREGARD BOTH FOR THE COMPETENCE OF THE LOWER COURTS AND FOR GOVERNING LEGAL PRINCIPLES.

Under New York state law, the District Court was required to review the record for two purposes: First, to determine whether the alleged libels concerned "matters of public concern" as defined by New York law; and second, since the first question must be answered affirmatively, to determine if Post had presented enough evidence of "gross irresponsibility" to raise an issue of fact. Dissatisfied by the lower courts' review of the record, Post asks this Court to perform a third review. He does not suggest what criterion should impel this Court to allocate a portion of its inevitably limited time to that task in a case which, after all, involves only money damages for a single plaintiff, not a human life, an affair of state, or a fact pattern of broad application to a large population of claimants.

As to the first fact issued noted above, both courts below concurred that the undisputed facts led to no conclusion other than that the loss to MMC and the subsequent remedial actions taken by the corporation were a "matter of public concern." The District Court, citing the magnitude of the financial loss and media interest, among other evidence submitted by Respondents, found that "a loss to a public corporation of $165 million due to unauthorized trading activities and the subsequent remedial actions taken by the corporation widely reported by the media, are of public concern." R. at 11a. In contrast, the court also found that Post presented "no evidence [that] the statements were not of public concern." *Id.* Likewise, the Second Circuit was convinced that the matter at issue was one of public concern, and that "summary judgment was

appropriate on the facts of this case." R. at 21a. "The fiscal and ethical integrity of this country's large financial institutions[,]" the court held, "is a matter of grave public importance and concern." *Id.* at 20a. Post must prove therefore in accordance with New York law, that Regan acted with "gross irresponsibility" or actual malice in making his remarks. *Id.*

The courts below then properly proceeded to evaluate the undisputed evidence to determine whether there was evidence sufficient to raise a fact question as to the existence of "gross irresponsibility." Both focused upon the facts, including the investigation conducted by MMC concerning the unauthorized trading losses. The District Court concluded that the investigation was sufficiently thorough to dispel any notion of "gross irresponsibility" on the part of Respondents:

> Defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner. The investigation was conducted over a two-month period, and was not done hastily. It involved interviews of relevant parties and reviews of transactions and documents by inside and outside counsel, by staff and independent accountants, as well as by senior management. The prepared remarks were reviewed by those same parties.

R. at 12a.

Judge Daronco then turned to a consideration of the evidence put forth by Post:

> In opposition, plaintiff submitted Regan's testimony that the termination on June 8, 1984 was a confirmation of the decision made in early March to terminate Post. This, however, is not inconsistent as MMC did not relinquish its right to terminate plaintiff for cause prior to June 30, 1984. The fact that Post was not a party to the concealed, unauthorized trading is irrelevant as he was charged with the responsibility of enforcing MMC's investment resolutions and complying with relevant state laws. Regan merely stated that as a result of the investigation, senior

> management agreed that it was appropriate to take certain actions regarding personnel, and that Post was one of the key personnel terminated. To conclude by innuendo from this that Post was an active participant in the unauthorized activity "stretch(es) an innuendo beyond its outer limits," and is unwarranted. . . . It seems appropriate to conclude the employment period of an employee, especially one already terminated, who is charged with responsibility for the conduct of his subordinates, where the conduct was outside the scope of company policy and led to losses of $165 million.

Id. at 12a-13a (citation omitted).

Finally, the District Court concluded by noting that the evidence was not sufficient to raise a fact question even under the lenient "preponderance" standard (rather than the "clear and convincing" standard applicable in some libel cases):

> [B]ased on the *entire* record, neither Regan nor MMC acted in a grossly irresponsible manner, and plaintiff has not, by a preponderance of the evidence, shown that they did. As plaintiff cannot demonstrate gross irresponsibility, it follows he cannot meet the higher standard of actual malice.

Id. at 13a (emphasis added).

Similarly, the Second Circuit found that Respondents acted reasonably after conducting a "careful and responsible" investigation. *Id.* at 21a. The Second Circuit evaluated the evidence proferred by Post and found it sorely wanting:

> It is true, as Post claims, that his name was mentioned to reporters as one of those discharged without any distinction being made between the alleged wrongdoers and their supervisors and without disclosure of the fact that Post had plans, before the unauthorized trading was discovered, to leave MMC for apparently unrelated reasons at some unspecified future date. Even if a defamatory interpretation can be given to Regan's speech and his subsequent comments to reporters, however, these factual

> omissions cannot as a matter of law satisfy the gross irresponsibility standard.

Id. at 21a.

In short, the courts below weighed the undisputed evidence presented in full accord with this Court's mandates regarding summary judgment. Summary judgment was correctly granted by the District Court in Respondents' favor and the Second Circuit properly affirmed.

Respondents respectfully submit that there is simply no legitimate reason for this Court to expend its resources to review an entire record of facts peculiar to an individual diversity case to determine whether the District Court and Second Circuit correctly scrutinized that record in applying a state court defined rule of law. Indeed, such a request as Post's has traditionally been denied by this Court.

This Court has often expressed its reluctance to review the findings of lower court judges, especially when the two lower courts concur. Absent obvious and exceptional showings of error, then, this Court will defer to the lower courts. *Goodman v. Lukens Steel Co.*, ____ U.S. ____, ____, 107 S. Ct. 2617, 2623 (1987) ("[B]oth courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task."); *National Collegiate Athletic Ass'n. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984) ("In accord with our usual practice, we must now accord great weight to a finding . . . which has been made by a district court and approved by a court of appeals."); *accord Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *see Berenyi v. District Director, INS*, 385 U.S. 630, 636 (1967) ("The policy underlying the "two-court" rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues.")

In the instant matter, Post comes before this Court with assertions of "egregious error" on the part of the Second Cir-

cuit. Pet. at 16. Stripped of its excess verbiage, however, Post's entire argument is simply that he disagrees with the lower courts' evaluation of the evidentiary record and their conclusion that, based on the undisputed facts, Regan and MMC had neither acted with "gross irresponsibility" nor actual malice. Curiously, despite his protestation, Post did not below, and does not here, present a focused attack on the nature and appropriateness of the investigation which defendants conducted. He does not even have an argument that defendants uttered libelous remarks so patently false as to brand the investigation a sham, since the one thing conspicuously missing from this libel suit is a clearly identified and proven false statement. In any event, however, the evaluation of the evidence presented is properly the province of the courts below, and not an issue for review by this Court.

Finally, Post repeats the same argument he previously asserted in connection with the privilege issue—that the Second Circuit has, by affirming the District Court's granting of summary judgment, deprived Post of his "fundamental" right to trial by jury. Pet. at 16. As previously discussed at Point I, *supra*, Post was not denied his right to a trial; rather, he failed to present even a scintilla of evidence that would warrant a trial. Moreover, it is well-established that the granting of summary judgment does not infringe upon the losing party's "right" to a jury trial. *E.g.*, *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902). Nor, as Post appears to suggest, is Rule 56 of the Federal Rules of Civil Procedure unconstitutional in that its successful use "deprived" him of a jury trial. *See, e.g.*, *Poller v. Columbia Broadcasting Sys. Inc.*, 368 U.S. 464 (1962); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2714 (1983).

In sum, Post improperly seeks review by this Court of evidentiary findings by two lower courts without regard for long-standing precedent that the Court will refrain from fact finding or evidence weighing expeditions when such a mission has already been completed thoroughly by lower courts, particu-

larly when state law governs; accordingly, this Court should deny Post's frivolous Petition.

CONCLUSION

For the reasons set forth above, Respondents John M. Regan, Jr. and Marsh and McLennan Companies, Inc. respectfully request that the instant Petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit be denied and that Respondents be awarded appropriate damages pursuant to Rule 49.2 of the Rules of the Supreme Court on the grounds that the instant Petition is clearly frivolous.

Dated: New York, New York
January 4, 1989

Respectfully submitted,

By: /s/ David L. Foster
(A Member of the Firm)

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APPENDIX

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES OF MARSH & McLENNAN COMPANIES, INC., PURSUANT TO RULE 28.1

Marsh & McLennan Companies, Inc. (Delaware)
National Economic Research Associates, Inc. (California)
National Economic Research Associates, Inc. (Delaware)
Madison Consulting Group, Inc. (Wisconsin)
Clayton Environmental Consultants, Inc. (Delaware)
Clayton Environmental Consultants of California, Inc. (California)
Clayton Environmental Consultants, Ltd. (Ontario)
Hudson Strategy Group, Inc. (Delaware)
The TBS Group, Inc. (Delaware)
LAR/Decision Research Corp. (Massachusetts)
TBS Capital, Inc. (Massachusetts)
TBS Security Corp. (Massachusetts)
TBS System Dynamics, Inc. (Massachusetts)
Temple, Barker & Sloane, Inc. (Massachusetts)
Faugere & Jutheau, S.A. (France)
Marsh & McLennan Companies GmbH (Germany)
Gradmann & Holler, K.G. (Germany)
Wolff & Hasselmann, K.G. (Germany)
Lippincott & Margulies, Inc. (New York)
C.T. Bowring & Co. Limited (United Kingdom)
Bowring Services Limited (United Kingdom)
Marsh & McLennan, Incorporated (Delaware)
Guy Carpenter & Company, Inc. (Delaware)
American Overseas Management Corporation (Canada)
Atalfa (U.K.) (United Kingdom)
Terra Nova Insurance Company Limited (United Kingdom)
The Carpenter Management Corporation (Delaware)
Guy Carpenter & Company, Inc. of Minnesota (Minnesota)
Balis & Co., Inc. (Pennsylvania)
Guy Carpenter & Company, S.A. (Belgium)
Guy Carpenter & Company (Canada) Limited (Canada)
Carpenter & Company A.p.S. (Denmark)
Carpenter & Company (Asia) Limited (Hong Kong)
Guy Carpenter Italia, S.R.L. (Italy)

Guy Carpenter & Company (Stockholm) AB (Sweden)
Bennich Reinsurance Management AB (Sweden)
Guy Carpenter & Co. Limited (United Kingdom)
Marsh & McLennan Holdings, Inc. (Delaware)
Marsh & McLennan (Korea) Ltd. (Korea)
Marsh & McLennan (Malaysia) SDN BHD (Malaysia)
Marsh & McLennan of Arkansas, Inc. (Arkansas)
M & M Insurance Management Services, Inc. (Delaware)
Marsh & McLennan World Services, Incorporated (Delaware)
Triad Services, Inc. (Delaware)
Marsh & McLennan Agency, Incorporated (District of Columbia)
Gay & Petway Insurance, Inc. (Florida)
Marsh & McLennan of Idaho, Inc. (Idaho)
Marsh & McLennan Agency, Inc. (Illinois)
Marsh & McLennan, Incorporated (Indiana)
Marsh & McLennan, Incorporated (Kentucky)
Marsh & McLennan of Louisiana, Inc. (Louisiana)
Marmac Agency, Inc. (Louisiana)
Marsh & McLennan, Inc. (Massachusetts)
Marsh & McLennan (Michigan)
Marsh & McLennan, Inc. of Nevada (Nevada)
Marsh & McLennan of New York, Inc. (New York)
Montgomery and Montgomery Incorporated (New York)
NBA Excess and Surplus Lines, Inc. (New York)
NBA Excess and Surplus Lines (Bermuda) Limited (Bermuda)
NBA Excess and Surplus Lines, Inc. (Connecticut)
NBA Excess and Surplus Lines, Inc. (Illinois)
NBA Excess and Surplus Lines, (Missouri)
NBA Excess and Surplus Lines, Inc. (New Jersey)
NBA Reinsurance Intermediaries, Inc. (New York)
NBA Excess and Surplus Lines, Inc. (Texas)
Marsh & McLennan, Incorporated (Ohio)
Marsh & McLennan, Inc. (Oklahoma)
Marsh & McLennan of Puerto Rico, Inc. (Puerto Rico)
Marsh & McLennan, Inc. (Texas)
Marsh & McLennan of Texas, Inc. (Texas)
Marsh & McLennan, Incorporated (Virginia)
Fairfax Insurance Agency, Incorporated (Virginia)

Marsh & McLennan Pty. Ltd. (Australia)
Bobri Pty. Ltd. (Australia)
DESBO Pty. Limited (Australia)
Baillieu Bowring (PNG) Pty. Ltd. (Papua New Gunea)
Kila Bowring Insurances Pty. Ltd. (Papau New Guinea)
Fenchurch Insurance Brokers Pty. Limited (Australia)
Marsh & McLennan (Barbados), Ltd. (Barbados)
Henrijean, Societe Anonyme (Belgium)
Marsh & McLennan-Bakhsh Ltd. (Bermuda)
Marsh & McLennan (Bermuda), Ltd. (Bermuda)
Transglobe Management (Bermuda) Ltd. (Bermuda)
Marsh & McLennan (Cayman Islands) Ltd. (Cayman Islands)
Marclen-Corretagem de Seguros Ltda. (Brazil)
Tudor, Marsh & McLennan Corretores de Seguros S.A. (Brazil)
Icarai S/A Administracao E Comercio (Brazil)
Les Assureurs Conseils Camerounais Faugere & Jutheau & Cie (Cameroon)
Marsh & McLennan, Limited/Limitee (Canada)
Durham & Bates Agencies (1969) Ltd. (British Columbia)
Charbonneau, Dulude & Associes (1985) Limitee/ Charbonneau, Dulude & Associates (1985) Limited (Canada)
Marshcan Insurance Brokers Limited (Canada)
Irish & Maulson Limited (Ontario)
Pratte-Morrissette, Inc. (Quebec)
Schatz Insurance Agencies, Inc. (Saskatchewan)
Marsh & McLennan (SASK) Ltd. (Saskatchewan)
Claro Marsh & McLennan S.A. Corredores De Seguros (Chile)
E. Dahl Jorgensen & Co. A/S (Denmark)
Marsh & McLennan, Scandinavia A.p.S. (Denmark)
Marsh & McLennan Sweden AB (Sweden)
Les Assureurs Conseils Gabonais Faugere & Jutheau & Cie (Gabon)
Marsh & McLennan-Hellas-L.L.C. (Greece)
DeLima & Cia Internacional Limitada, Marsh & McLennan Inc., y Compania Limitada (Guatemala)
Technicos en Seguros, S.A. (Guatemala)
Marsh & McLennan South East Asia, Limited (Hong Kong)
Marsh & McLennan-Sun Hung Kai Limited (Hong Kong)

Marsh & McLennan Italia & Co. S.P.A. (Italy)
Africaine De Courtage d'Assurances Faugere & Jutheau, S.A. (Ivory Coast)
Les Assureurs Conseils de Cote d'Ivoire Faugere & Jutheau & Cie (Ivory Coast)
Marsh & McLennan Japan Ltd. (Japan)
Marsh & McLennan Co. Inc. (Liberia)
Marsh & McLennan Luxembourg, S.A. (Luxembourg)
Marsh & McLennan Insurance Management Services, S.A. (Luxembourg)
S.P.K. Bowring Marsh & McLennan Sdn. Bhd. (Malaysia)
BMZ-Marsh & McLennan, S.A. de C.V. (Mexico)
Bourchier Marquard Asociados S.A. (Mexico)
Corrinter Corredores Internacionales De Reaseguros S.A. (Mexico)
Interriesgo, S.A. (Mexico)
Hudig-Langeveldt Groep B.V. (Netherlands)
Marsh & McLennan Fenwick Limited (New Zealand)
Robert Irvine Management Limited (New Zealand)
Marsh & McLennan Philippines Insurance Brokers, Inc. (Philippines)
Leone Bowring Limited (Sierra Leone)
C.T. Bowring Singapore Pte Ltd. (Singapore)
Marsh & McLennan Bowring Pte. Ltd. (Singapore)
Marsh & McLennan Espana, S.A., Insurance Agent (Spain)
Marsh & McLennan (Taiwan) Limited (Taiwan)
Marsh & McLennan (Thai) Company Ltd. (Thailand)
Insurance Brokers West Indies Limited (Trinidad)
C.T. Bowring International Broking Holdings, Ltd, (United Kingdom)
Insurance Brokers of Nigeria (Nigeria)
Marsh & McLennan London Limited (United Kingdom)
Marsh & McLennan Limited (United Kingdom)
Marsh & McLennan, Incorporated (Virgin Islands)
C.T. Bowring and Associates (Private) Limited (Zimbabwe)
Muir Beddall (Zimbabwe) Limited (Zimbabwe)
C.T. Bowring and Associates (Private) Limited (Zimbabwe)
William M. Mercer, Incorporated (Delaware)

William M. Mercer-Meidinger-Hansen, Incorporated (Delaware)
Compensation Institute, A Corporation (California)
JEBOR, Inc. (California)
National Medical Audit (California)
Hansen International Limited (Delaware)
Hansen SARL (France)
Diversified Corporate Services, Inc. (Georgia)
William M. Mercer-Meidinger-Hansen, Incorporated (Indiana)
Employee Benefit Plans of Wichita, Inc. (Kansas)
BCC, Inc. (Kentucky)
William M. Mercer-Meidinger-Hansen Asset Planning, Incorporated (Kentucky)
Meidinger International Corporation (Kentucky)
William M. Mercer-Meidinger-Hansen of Kentucky, Inc. (Kentucky)
William M. Mercer-Meidinger-Hansen, Incorporated (Louisiana)
William M. Mercer, Incorporated (Massachusetts)
William M. Mercer-Meidinger-Hansen, Incorporated (Michigan)
William M. Mercer-Meidinger-Hansen, Incorporated (Nevada)
Retirement Plans, Inc. (Ohio)
William M. Mercer-Meidinger, Incorporated (Ohio)
William M. Mercer-Meidinger-Hansen, Incorporated (Oklahoma)
William M. Mercer, Incorporated (Puerto Rico)
Professional Services, Incorporated (Texas)
William M. Mercer-Meidinger-Hansen of Texas, Inc. (Texas)
William M. Mercer-Meidinger-Hansen, Incorporated (Virginia)
William M. Mercer-Meidinger-Hansen, Incorporated (Virginia)
William M. Mercer Campbell Cook & Knight Pty. Ltd. (Australia)
MPA Superannuation Services Limited (Australia)
MPA Superfund Nominees Pty. Limited (Australia)
William M. Mercer-Henrijean, S.A. (Belgium)
William M. Mercer-MPA S.A. (Belgium)
William M Mercer Limited/Limitee' (British Columbia)
Metcalfe Agencies Limited (Quebec)

Societe Conseil Mercer Limitee (Quebec)
William M. Mercer-Faugere et Jutheau S.A.R.L. (France)
Metropolitan Pensions Association (Deutschland) GmbH (Germany)
William M. Mercer GmbH (Germany)
William M. Mercer-MPA Limited (Hong Kong)
William M. Mercer Limited (Hong Kong)
William M. Mercer Limited (Taiwan)
Metropolitan Pensions Associations (Irish Trustees) Limited (Ireland)
William M. Mercer Limited (Japan)
William M. Mercer (Malaysia) Sdn. Bhd. (Malaysia)
Bourchier, Marquad, Zepeda Asociados S.C. (Mexico)
B.M.A., S.A. (Mexico)
Consultores BMZ, Agente De Seguros, S.A. de C.V. (Mexico)
William M. Mercer, B.V. (Netherlands)
William M. Mercer Services B.V. (Netherlands)
William M. Mercer-Eriksen Ltd. (New Zealand)
William M. Mercer Philippines, Incorporated (Philippines)
William M. Mercer Pte. Ltd. (Singapore)
William M. Mercer A.G. (Switzerland)
William M. Mercer-MPA Limited (United Kingdom)
William M. Mercer Fraser Limited (United Kingdom)
J. Ross Hanson Inc. (District of Columbia)
DCF Pensioneer Trustees (Dublin) Limited (Ireland)
William M. Mercer-MPA Limited (Ireland)
DCF Consultants PTE Limited (Singapore)
Bowring (Trustees) Limited (United Kingdom)
Duncan C. Fraser & Co. (United Kingdom)
Fraser Financial Planning Limited (United Kingdom)
Heywood & Partners (Holdings) Limited (United Kingdom)
Heywood & Partners Limited (United Kingdom)
Metropolitan Actuarial Services Limited (United Kingdom)
Metropolitan Computer Services Limited (United Kingdom)
Metropolitan Pensions Association (Trustees) Limited (United Kingdom)
Metropolitan Statistical Services Limited (United Kingdom)
MPA (Chichester) Limited (United Kingdom)

MPA Employee Benefit & Compensation Consultants Limited (United Kingdom)
MPA (Holdings) Limited (United Kingdom)
MPA (International) Limited (United Kingdom)
Pension Trustees Limited (United Kingdom)
Pensioneer Trustees Limited (United Kingdom)
Pensioneer Trustees (London) Limited (United Kingdom)
Southampton Place Trustee Co. Ltd. (United Kingdom)
William M. Mercer-Grant Simmons Limited (United Kingdom)
William M. Mercer Comercio e Servicos Ltda. (Brazil)
William M. Mercer Consultoria Ltda. (Brazil)
Marsh & McLennan Group Associates, Inc. (Delaware)
Marsh & McLennan Group Associates of Arkansas, Inc. (Arkansas)
Marsh & McLennan National Marketing Corporation (Delaware)
Marsh & McLennan Securities Corporation (Delaware)
Smith-Sternau Organization, Inc. (Delaware)
The Schinnerer Group, Inc. (Delaware)
Victor O. Schinnerer & Company, Inc. (Delaware)
Victor O. Schinnerer & Co. (Bermuda), Ltd. (Bermuda)
Potomac Insurance Managers, Inc. (Delaware)
Victor O. Schinnerer of Illinois, Inc. (Illinois)
Victor O. Schinnerer & Company, Inc. (Ohio)
Victor O. Schinnerer & Company Ltd. (United Kingdom)
Encon Holdings, Inc. (Ontario)
Rockcliffe Investors, Ltd. (Ontario)
Encon Insurance Managers Inc. (Ontario)
National Program Administrator Investments, Inc. (Ontario)
National Insurance Managers (N.I.M.) Inc. (Ontario)
Encon Reinsurance Managers Inc. (Ontario)
Encon Holdings, Inc. (Texas)
Panhandle Insurance Agency, Inc. (Texas)
Encon Underwriting Agency, Inc. (Texas)
M.A. Gesner of Illinois, Inc. (Illinois)
Marsh & McLennan Group Associates of Illinois, Inc. (Illinois)
Marsh & McLennan Group Associates, Inc. (Indiana)
Marsh & McLennan Group Associates, Inc. (Kentucky)
Marsh & McLennan Group Associates, Inc. (Louisiana)

Marsh & McLennan Group Associates, Inc. (Massachusetts)
Marsh & McLennan Group Associates, Inc. (Michigan)
Marsh & McLennan Group Associates, Inc. (Nevada)
Marsh & McLennan Group Associates Agency, Inc. (Ohio)
Marsh & McLennan Group Associates, Inc. (Oklahoma)
Marsh & McLennan Group Associates, Inc. (Texas)
Marsh & McLennan Group Associates, Inc. (Virginia)
Marsh & McLennan Group Associates Limited (Ontario)
Marsh & McLennan Group Associates Limited (United Kingdom)
The Putnam Companies, Inc. (Delaware)
Marsh & McLennan Real Estate Advisors, Inc. (Delaware)
Putnam Capital Management, Inc. (Delaware)
Putnam Investor Services, Inc. (Delaware)
The Putnam Management Company, Inc. (Delaware)
Putnam Fiduciary Trust Company (Massachusetts)
Putnam Financial Services, Inc. (Massachusetts)
Putnam Insurance Agency, Inc. (Massachusetts)
The Putnam Advisory Company, Inc. (Massachusetts)
Putnam International Advisors Ltd. (United Kingdom)
The Putnam Corporation (Massachusetts)
The Putnam Oil Company, Inc. (Massachusetts)
Putnam Overseas Institutional Management Company Limited (Bahamas)
Putnam Arabia Company Limited (Bermuda)
Putnam Overseas Institutional Advisory Company, Ltd. (Bermuda)
Putnam International Advisory Company, S.A. (Luxembourg)
C.T. Bowring & Co. Ltd. (England)
Bowring Services Ltd. (England)
C.T. Bowring (Insurance) Holdings Ltd. (England)
C.T. Bowring Reinsurance Ltd. (England)
Winchester Bowring Ltd. (England)
C.T. Bowring & Co. (Insurance) Ltd. (England)
Bowring Aviation Ltd. (England)
Bowring Aviation Advisory Services Ltd. (England)
Bowring Marine & Energy Insurance Brokers Ltd. (England)
Bowring Non-Marine Insurance Brokers Ltd. (England)
C.T. Bowring Space Projects Ltd. (England)

Bowring Developments Ltd. (England)
Bowring U.K. Ltd. (England)
Bowring London Ltd. (England)
Bowring South East Ltd, (England)
Bowring Eastern Ltd. (England)
Bowring Professional Indemnity Ltd. (England)
Bowring Professional Indemnity Scotland Ltd. (Scotland)
Bowring U.K. Marine Cargo Ltd. (England)
Aviation Insurance Advisory Services Ltd. (England)
Bowring Risk Management Ltd. (England)
London Insurance Brokers Ltd. (England)
R.I.C.S. Insurance Services Limited (England)
B.W. Noble Ltd. (England)
Bowring Wolverhampton Ltd. (England)
Winsons Insurance Brokers Ltd. (England)
Bowring & Layborn Ltd. (Bowring Individual Financial Services) (England)
L.B.L. (Life, Pension & Mortgage Brokers) Ltd. (England)
Keith Shipton & Co. Ltd. (England)
C.T. Bowring International Broking Holdings Ltd. (England)
Victor O. Schinnerer & Company (UK) Ltd. (England)
Keith Shipton Developments Ltd. (England)
Risk Improvement Ltd. (England)
Bital Ltd. (England)
Microsafe Ltd. (England)
Bowring M.K. Ltd. (England)
Bowring Bradford Ltd. (England)
Bowring Martin Ltd. (N. Ireland)
Ulster Insurance Services Ltd. (N. Ireland)
Bowring Hughes Ltd, (England)
Bowring Midlands Ltd. (England)
Bowring Wales Ltd. (England)
Miller Smith (Insurance Brokers) Ltd. (England)
Miller Smith (Life Pension & Mortgage Brokers) Ltd. (England)
Bowring Western Ltd. (England)
Bowring T.L. Dallas Ltd. (England)
T.L. Dallas (Marine) Ltd. (England)
Bowring Macalaster & Senior Ltd. (Scotland)

Bowring East Scotland Ltd. (Scotland)
RIAS Insurance Services Ltd. (Scotland)
Bowring Jowitt & Freeman Ltd. (England)
Bowring York Ltd. (England)
Bowring Tyson Ltd. (England)
Bowring Tyson (I.O.M.) Ltd. (Isle of Man)
Bowring Captive Management Ltd. (Isle of Man)
Bowring Scholfields Ltd. (England)
Bowring Macalaster & Alison Aberdeen Ltd. (Scotland)
Bowring Rose Ltd. (England)
Bowring Rose (Life & Pension Brokers) Ltd. (England)
Bowring Camper & Nicholsons Ltd. (England)
W. John Rose Insurance Brokers Ltd. (England)
J. William Crass & Company Ltd. (England)
Wedge & Company Ltd. (England)
Preston Powell (Holdings) Ltd. (England)
Bowring Preston Powell Ltd. (England)
Bowring Preston Powell (Teesside) Ltd. (England)
Bowring Wear & Tees Ltd. (England)
Bulman Finance Co. Ltd. (England)
Bowring Preston Powell (Life & Pensions) Ltd. (England)
Bowring Gauntlet Ltd. (England)
Bowring Smith (Insurance Brokers) Ltd. (England)
William Smith & Partners (Northern) Ltd. (England)
C.T. Bowring (Guernsey) Ltd. (Guernsey)
Mathews Mulcahy & Sutherland Ltd. (Eire)
C.T. Bowring (Ireland) Ltd. (Eire)
Marsh & McLennan (Ireland) Ltd. (Eire)
Goodbody M.M. & S. Assurances Ltd. (Eire)
Insurance Agencies-West Indies Ltd. (Trinidad)
Insurance Brokers-West Indies Ltd. (Trinidad)
Insurance Brokers-Barbados Ltd. (Barbados)
C.T. Bowring Reinsurance Australia Pty. Ltd. (Australia)
Baillieu Bowring Holdings Pty. Ltd. (Australia)
Australian World Underwriters Pty. Ltd. (Australia)
Baillieu Bowring Pty. Ltd. (Australia)
C.T. Bowring Reinsurance New Zealand Ltd. (New Zealand)
C.T. Bowring (Japan) Ltd. (Japan)
Bowring & Tung (Insurance) Ltd. (Hong Kong)

Marsh & McLennan Ltd. (New Zealand)
John Hornibrook Ltd. (New Zealand)
Bowring Burgess Marsh & McLennan Ltd. (New Zealand)
Reinsurances New Zealand Ltd. (New Zealand)
Marsh & McLennan Insurance Services Ltd. (New Zealand)
Bowring Burgess Marsh & McLennan Services Ltd. (New Zealand)
Risk Management Ltd. (New Zealand)
Bowring Burgess Marsh & McLennan Developments Ltd. (New Zealand)
Bowring Burgess Marsh & McLennan Ltd. (W. Samoa)
Bowring Burgess Marsh & McLennan Ltd. (Fiji)
Risk Management (Pacific) Ltd. (Fiji)
Reinsurance (Pacific) Ltd. (Fiji)
C.T. Bowring (South Africa) (Pty) Ltd. (South Africa)
First Bowring and Associates Holdings (South Africa) Ltd. (South Africa)
First Bowring & Associates Ltd. (South Africa)
Khulani Insurance Brokers (Pty) Ltd. (South Africa)
Insurance Brokers (Botswana) (Pty) Ltd. (Botswana)
Bowring Barclays & Associates (Lebowa) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Gazankulu) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Venda) (Pty) Ltd. (Venda)
Bowring Barclays & Associates (Lesotho) (Pty) Ltd. (Lesotho)
Bowring Barclays & Associates (Kangwane) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Pty) Ltd. (S.W. Africa)
Profund Insurance Brokers (Pty) Ltd. (Bophuthatswana)
Barclays Insurance Brokers South Africa Ltd. (South Africa)
A.A. Mutual Agricultural Services (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Transvaal) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Natal) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Cape) (Pty) Ltd. (South Africa)

Bowring Barclays & Associates (Eastern Province) (Pty) Ltd. (South Africa)
Stewart Wrightson Holdings (South Africa) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates Qwa Qwa (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Border) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Northern Transvaal) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates Pension Brokers (Pty) Ltd. (South Africa)
Commercial Union Agricultural Services (Pty) Ltd. (South Africa)
Risk Management South Africa (Pty) Ltd. (South Africa)
Bowring Barclays & Associates Risk Management (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (O.F.S.) (Pty) Ltd. (South Africa)
Export & Domestic Credit Insurance Brokers (Pty) Ltd. (South Africa)
Cape Insurance Brokers (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (R.B.S.) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Technical Services) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Transvaal Central) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Employee Benefits) (Pty) Ltd. (South Africa)
Bowring Barclays Protection Consultants (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Management Services) (Pty) Ltd. (South Africa)
PI Insurance Brokers (Pty) Ltd. (South Africa)
Bowring & Minet (Swaziland) (Pty) Ltd. (South Africa)
Bowring Barclays & Associates (Transkei) (Pty) Ltd. (Transkei)
Bowring Barclays & Associates (Ciskei) (Pty) Ltd. (Ciskei)
Insurance Brokers of Nigeria (Nigeria)

C.T. Bowring do Brasil Participacoes e Services (Brasil)
Bowring Banif de Reaseguros S.A. (Spain)
Bowring Members Agency Ltd. (England)
C.T. Bowring (Underwriting Agencies) Ltd. (England)
C.T. Bowring Trading (Holdings) Ltd. (England)
C.T. Bowring & Co. (Fish Oils) Ltd. (England)
Baffin Trading Company Ltd. (Canada)
Tower Hill Property Company Ltd. (England)
Tower Hill Developments Ltd. (England)
CTB Limited (England)
Epernay Property Development Ltd. (England)
3 Tower Hill Ltd. (England)
Bowring Information and Communications Systems Ltd. (England)
Bowring Computer Services Ltd. (England)
The Bowring Steamship Company Ltd. (England)
C.T. Bowring (Charities Fund) Ltd. (England)
C.T. Bowring & Co. (Pension Fund) Ltd. (England)
The Bowring Scholarship Trust (England)
The Bowring Educational and Welfare Trust (England)
Marsh & McLennan Bowring Marine & Energy Group Ltd. (England)
Marsh & McLennan Ltd. (England)
Marsh & McLennan London Limited (England)